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Candace Havens
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WORKING SESSION MEMORANDUM

DATE: October 11, 2013

TO: Alderman Marcia T. Johnson, Chairman
Members of the Zoning and Planning Committee

FROM: Candace Havens, Director of Planning and Development
James Freas, Chief Planner, Long-Range Planning
Amanda Stout, Senior Planner, Long-Range Planning

RE: #294-13: ALD DANBERG proposing amendment to **Sec. 30-24(f) Inclusionary Zoning** to clarify the limitation on use of public funds in constructing inclusionary units and to expand on where the use of public funds for inclusionary units will be allowed.

MEETING DATE: October 16, 2013

CC: Board of Aldermen
Planning and Development Board
Donnalyn Kahn, City Solicitor

EXECUTIVE SUMMARY

It is expensive to build residential units in Newton, and developers must often seek creative financing solutions, particularly to build affordable housing units. The current inclusionary zoning provisions of the Zoning Ordinance precludes the use of public development funds for the creation of the affordable units required under the ordinance, presuming that these will be financed through the larger development project. The proposed amendment would define "public development funds" and incentivize developers to go beyond the required provision of affordable units by providing more units, providing units with a deeper level of affordability, or providing affordable units that are accessible to people with disabilities.

BACKGROUND

In mid-2012, a small joint working group was formed by the Economic Development Commission and the Newton Housing Partnership to identify and draft proposals for improvement to the current Inclusionary Zoning regulations in Chapter 30 Section 24(f). Subsection (9) states that developers may not use public funds to meet the affordable share of housing that is obligated by that requirement (15% of the dwelling units in developments exceeding two dwelling units), but where that minimum requirement is exceeded or when a non-profit developer proposes that half or more of the units will be affordable, the use of public funds is permitted. Public development funds in this context include Community Preservation Act (CPA) funds, HOME funds, tax exempt bond financing, and others.

As the EDC and NHP observed, it has become so expensive to build any residential development in Newton that all developers must seek creative approaches to financing affordable housing. By incentivizing developers to go beyond the requirements of the inclusionary zoning provisions of the ordinance, through clearly allowing the use of public development funds, the City may be able to achieve more affordable units through private development projects.

ANALYSIS

Public development funds

The Inclusionary Zoning ordinance neither permits the use of public funds nor defines the term. Since the term is only used in this one paragraph, it need not be called out in a separate “Definitions” section. It is recommended that a definition of “public development funds” be included within the proposed text amendment to 30-24(f)(9) to provide general clarity and to specifically clarify that tenant-based rental assistance (also known as “Section 8”) is not included in the landscape of public funds that cannot be used for the creation of affordable units required by the inclusionary zoning provisions of the Zoning Ordinance. Thus, it is recommended that the definition specify that “public development funds” refer to programs that are eligible to qualify as a “subsidy” under the Massachusetts Comprehensive Permit Statute, *760 CMR 56.00 Comprehensive Permit: Low or Moderate Income Housing*:¹

760 CMR 56.02 Definitions.

Subsidy – means assistance provided by a Subsidizing Agency to assist the construction or substantial rehabilitation of Low or Moderate Income Housing, including direct financial assistance; indirect financial assistance through insurance, guarantees, tax relief, or other means; and non-financial assistance, including in-kind assistance, technical assistance, and other supportive services. A leased housing, tenant-based rental assistance, or housing allowance program shall not be considered a subsidy for the purposes of 760 CMR 56.00.

Applicability of public development funds to housing development

The current inclusionary zoning ordinance prohibits the use of public development funds for the purpose of creating the required affordable units. However, it also states that it is not the intent of this

¹ <http://www.mass.gov/hed/economic/eohed/dhcd/legal/regs/760-cmr-56.html>

section of the ordinance to prohibit the use of such funds to exceed the minimum number of required units and it specifically allows nonprofit housing developers to be exempt from the public funds prohibition in cases where 50% or more of the proposed units will be affordable. This current language is unclear and confusing, as a statement of intent is not generally considered a rule and therefore, the proposed amendment seeks to clarify and expand the situations in which public development funds may be used and removes the unnecessary references to intent in this section

The proposed amendment would create an incentive for developers to build additional affordable units while maintaining the prohibition on using public development funds for the required portion of affordable housing. If a project proposes the creation of more units (i.e., in excess of the required 15%), units that are more affordable (i.e., to people at 70% of Area Median Income rather than the usual 80%), or a greater level of accessibility than that which is required by law for persons with disabilities, then the for-profit or nonprofit developer would be eligible to use public development funds. The intention of this proposed change is to acknowledge that projects that go “above and beyond” and create more affordability, which is something that the City wishes to encourage, require a greater array of financing sources.

At the September 9, 2013 meeting of the Zoning and Planning Committee, members of the Board of Aldermen suggested that the prohibition on public funding might be dropped entirely and the circumstances under which a developer might use public development funds be reviewed as part of the special permit process. Staff recommends against this approach. For a developer, leaving the question of the availability of public funds open until after the resolution of the special permit process would increase risk and uncertainty in contradiction to the intent of incentivizing the creation of more affordable units than are currently required. Staff suggests that the availability of public development funds as it pertains to inclusionary housing remain regulated through this ordinance and reviewed by the Director of Planning and Development to ensure that a proposed development project is in fact “going above and beyond” and meeting the City’s affordability goals.

There remain a number of issues that require further investigation in order to fully understand the implications of this policy change. For example:

- What would be the impacts on the use of City-controlled public development funds generally?
- How would this policy change affect the Newton Housing Authority?
- The proposed change would remove the current exemption for non-profit affordable housing developers. What are the implications of this change? Have there been projects built that have taken advantage of this exemption?
- Can we anticipate other outcomes than the ones intended?

PROPOSED TEXT AMENDMENTS

1. Revise Chapter 30, Section 24, (f) Inclusionary Zoning (9) Public Funding Limitation

~~The intent of section 30-24(f) is that an~~ An Applicant is shall not to use public development funds to construct Inclusionary Units required under this section. Public development funds shall mean funds for housing construction or rehabilitation if provided through a program eligible to serve as a 'subsidy' under 760 CMR 56.00 Comprehensive Permit: Low or Moderate Income Housing. However, the Applicant may use public development funds to construct those Inclusionary Units that are found by the Director of Planning and Development to be consistent with any of the following:

- a) Those that represent a greater number of affordable units than are otherwise required by this subsection;
- b) Those that are lower than the maximum eligible income limit for some or all inclusionary units by at least ten percentage points below that stipulated in §30-24(f)(1);
- c) Those that exceed regulatory requirements in providing for persons having disabilities.

~~; this provision however, is not intended to discourage the use of public funds to generate a greater number of affordable units than are otherwise required by this subsection. If the Applicant is a non-profit housing development organization and proposes housing at least 50 per cent of which is affordable to Eligible Households, it is exempt from this limitation.~~

NEXT STEPS

The Planning Department will continue to do additional research and seek the answers to questions raised in this memo. If the Zoning and Planning Committee would like additional information to inform its assessment of this proposal, staff requests the Committee define what additional data and analysis it may need. Alternatively, if the Committee is satisfied with the proposal as written, it has the option of scheduling it for Public Hearing at an upcoming meeting.